No. 80-251

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD ROSTKER, DIRECTOR OF SELECTIVE SERVICE,
Appellant,

v.

ROBERT L. GOLDBERG, *et al.*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR AMICUS CURIAE NATIONAL ORGANIZATION FOR WOMEN

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BRIEF FOR AMICUS CURIAE NATIONAL ORGANIZATION FOR WOMEN

INTEREST OF AMICUS

The National Organization for Women (NOW) is a nonprofit corporation founded in 1966 and dedicated to the achievement of equality for women in American society. NOW is the largest feminist organization in the world, with more than 125,000 members and chapters in every state in the nation. NOW's main purpose is ". . . to take direct action to bring women into the full participation of society now, exercising all the privileges and responsibilities thereof in truly equal partnership with men." Bylaws, Article III.

NOW has participated as amicus curiae in a number of cases before this Court involving challenges to laws and governmental policies that discriminate on the basis of sex. NOW has also engaged in legislative action and litigation in an effort to secure equal rights for women.

NOW believes that this case poses an issue of critical importance to the achievement of full equality between the sexes. The requirement to register and be classified for eligibility for induction into the armed forces is a responsibility which NOW believes, if imposed at all, must be imposed equitably on all members of society who are capable of serving, irrespective of gender.

SUMMARY OF ARGUMENT

This case involves the constitutionality of those provisions of the Military Selective Service Act (MSSA), 50 U.S.C. App. § 451 *et seq.*, which require all male citizens and residents of the United States between the ages of eighteen and twenty-six to register for eligibility for induction into the Armed Forces. 50 U.S.C. App. §§ 453, 454(a). The goal of the MSSA is to register a pool of individuals who can be inducted into military service in the event of a national emergency. The MSSA neither requires nor permits any women to register and be classified.

This case does not involve the questions of eligibility for induction, assignment of personnel after induction, or assignment of women to combat roles, however those are defined. The sole issue presented is whether the exclusion of all women from the right to register and be eligible for induction violates the fifth amendment to the United States Constitution.

The line drawn by the MSSA is a rigid gender line which no woman can cross. It is blatant and harmful discrimination on the basis of sex, and in order to survive constitutional challenge, it must bear a substantial relationship to an important governmental purpose. It utterly fails that test. Indeed, it cannot even pass the rational relationship test which the government asserts is applicable. By excluding women from eligibility, the Act substantially reduces the quality of the pool from which the members of the armed forces are drawn.

The government's contention that the statute is a neutral classification based on "combat eligibility" is an attempt to shift attention from the issue at bar to a hypothetical question not raised in this case. In any event, the elusive definition of "combat" and the overwhelming evidence that women can perform "combat" roles demonstrate that the notion of "combat eligibility" cannot justify the exclusion of women from registration.

The exclusion of women from registration has a profound and harmful impact on women and society as a whole. The exclusion reinforces the sex-role stereotypes harmful to women that have proven so resistant to change. By giving a governmental imprimatur to these stereotypes, the MSSA sanctions a continuing false view of women as weak and unfit to serve their country. This stereotype of women as incapable of defending their country or themselves causes harm to women by increasing the prospect of violence in their daily lives. The military, a powerful and central social institution, should not be permitted to continue to support sex-role stereotyping that locks women into the status quo.

The MSSA also harms women by excluding them from the compulsory involvement in the community's survival that is perceived as entitling people to lead it and derive from it the full rights and privileges of citizenship. Permitting women to serve as volunteers is not the equivalent of registering them and does not alleviate the constitutional infirmity of a male-only registration.

In sum, the exclusion of women from registration disserves the goal of an effective military and powerfully reinforces harmful stereotyped beliefs about women and their role in our society. The cycle of old expectations and behaviors cannot be broken as long as the government, through the exclusion of women from registration, continues to lend unwarranted credence to the stereotypes that fuel that cycle. The decision of the district court declaring the challenged provisions of the Selective Service Act unconstitutional should be affirmed by this Court.

ARGUMENT

I. The Exclusion of Women from Registration Is A Denial Of Equal Protection of The Laws.

The goal of the MSSA is to register a pool of individuals who, in the event of a national emergency, can be inducted promptly into the armed forces. By requiring all males and no females to register for possible induction into the armed forces, the MSSA tells all women, that solely because of their gender, they will not be called upon to serve and defend their country, that they will not be relied upon in time of greatest national need. It thus announces to women (and their male compatriots) that women constitute a different—and inevitably lesser—class from all men merely on the basis of gender. The exclusion of women from the requirements of the MSSA is sex discrimination, pure and simple.

A. *The Exclusion of Women From Registration Bears Neither A Substantial Relationship To An Important Governmental Objecitve Nor a Rational Relationship to a Proper Governmental Purpose.*

The decisions of this Court from *Reed* v. *Reed*, 404 U.S. 71 (1971) to *Wengler* v. *Druggists Mutual Inc. Co.*, 446 U.S. 142 (1980) make unequivocally clear that laws drawing gender lines must bear a substantial relationship to an important governmental objective. Gender-based classifications require heightened scrutiny because of our nation's "long and unfortunate history of sex discrimination," *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) and because they "have frequently been revealed on analysis to rest only upon 'old notions' and 'archaic and overbroad' generalizations. . . ." *Califano* v. *Goldfarb*, 430 U.S. 199, 208 (1977). Examining the MSSA against this standard compels the conclusion that the exclusion of all women from registration does not bear a substantial relationship to the governmental interest in military readiness and flexibility. Indeed, because Congress has

undermined rather than promoted that goal by arbitrarily eliminating all women from the pool of potential inductees, the Act does not even bear a rational relationship to a proper governmental purpose.[1]

First, from the standpoint of sheer numbers, the goal of the MSSA is badly served by excluding all women. Between 1980 and 1992 the population of young males will decrease by almost 25 percent. M. Binkin & S. Bach, *Women and the Military* 66 (1977). The decreasing male population has in fact been one of the pragmatic reasons for the increased utilization of women in the armed services in the past decade. Office of the Secretary of Defense, *Use of Women in the Military* (2d ed. 1978) (Joint Appendix [J.A.] at 111).

Second, utilization of women ensures a higher quality pool of registrants. Common sense dictates that selection from a pool including men and women will yield a better quality force than will the arbitrary elimination of one-half the potential pool. Women today are an important factor in our nation's workforce and an essential part of the technically trained and trainable pool of young people needed to operate the modern military. In light of the increasingly technological nature of the current military, the female percentage in the pool of people with the required skills is steadily increasing. [2] Indeed, women

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[1] For a fuller discussion of the necessity for applying a heightened level of scrutiny in this case, amicus respectfully refers the Court to the brief submitted by the Women's Legal Defense Fund and the Women's Equity Action League Fund, Inc.

[2] *See, e.g.*, M. Janowitz, *Military Conflict* 61, 65, 110-135 (Sage-mark ed. 1978); M. Janowitz, *The Professional Soldier* 32 (1971); Enloe, *Women: the Reserve Army of Army Labor*, 12 Rev. of Pol. Economies 42 (1980); Goldman, *The Changing Role of Women in the Armed Forces*, 78 Am. J. of Soc. 892 (1973); Goodman, *Women, War and Equality: An Examination of Sex Discrimination in the Military*, 5 Women's Rights L. Rep. 243 (1979); M. Segal, Women in Combat: Contributions to the War of Words 3 (paper prepared for the Inter-University Seminar on Armed Forces & Society,

are a vital part of the administrative, computer, communications, medical and other technical personnel of this nation, all of whom are essential to the military.[3]

In the modern military, education is the best measure of the potential of a recruit or inductee. According to the Department of Defense, possession of a high school degree is the factor most closely correlated to success in the armed forces. *America's Volunteers, supra* note 3, at 30. More women than men complete high school. *Id.* at 31. Similarly, the ranks of military officers have traditionally been drawn from the college population, which is now more than 50 percent women. *U.S. Bureau of the Census, No. 355, School Enrollment—School and Economic Characteristics of Students* 20 (Oct. 1979). Women recruits average ten points higher than men on military entrance tests. *Use of Women in the Military, supra* at 22-23.

Third, many performance indicators confirm the high quality of women as soldiers. Women are being promoted at the same or higher rates than men in all military occupations open to women. *America's Volunteers, supra* note 3, at 74. Women recruits are less likely to have discipline problems and they lose less time than men for absence without leave, desertion, alcoholism and drug

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Oct. 25, 1980); Hoiberg, Military Occupations: The Cutting Edge for Women? (Rep. No. 80-27) (undated, available from Naval Health Research Center, San Diego, Cal.).

[3] *See U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 2080, Perspectives on Working Women: A Data-book,* 10-11 (Table 11) (1980); *see also* U.S. Dept. of Labor, Women's Bureau, *The Employment of Women: General Diagnosis of Developments and Issues* (April 1980); Office of the Secretary of Defense, *America's Volunteers: A Report on the All-Volunteer Armed Forces* ch. 3 (1978) (J.A. at 81); *Presidential Recommendations for Selective Service Reform: A Report to the Congress Pursuant* to P.L. 96-107 (Feb. 11, 1980) (J.A. at 59); *Use of Women in the Military, supra* (J.A. at 107, 116).

abuse. *Binkin & Bach, supra* at 62 (J.A. at 142); Hoiberg & Thomas, The Economics of Sex Integration: An Update of Binkin & Bach 10 (paper presented at the twentieth anniversary conference of the Inter-University Seminar on Armed Forces & Society, Oct. 25, 1980). These data demonstrate that the inclusion of women would significantly enhance the quality of the pool of registrants.

Despite this overwhelming evidence that the exclusion of women disserves military readiness, some have argued that women should not be registered for other reasons. None of these concerns justifies a blanket exclusion of women from registration.

First, some nonparties to this lawsuit argue that because American men are on the average taller, heavier, and stronger than American women, it follows that women are somehow unfit to serve. This conclusion makes no sense. The fact that the average man is stronger than the average woman does not mean that all men are stronger than all women. Differences in strength and physical conditioning narrow and disappear when women receive adequate training, and it is a simple fact that some women are stronger than some men.[4] Moreover, size and strength are not always synonymous. A person trained in the martial arts can defeat a larger opponent. Technological advances also continue to diminish the importance of brute strength. A soldier with a smaller physique can perform certain tasks in today's planes, ships,

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[4] Studies of women in athletics provide ample evidence of these facts. A. Ryan & F. Allman, Jr., *Sports Medicine* ch. 10 (1974). *See* Wood, *Sex Differences In Sports*, N.Y. Times Magazine, (May 18, 1980); *The Weaker Sex? Hah!*, Sports Illustrated, (June 26, 1978). *See also* Harris, *Physiological Differences Between the Sexes: Exploring Old Myths* (paper presented at Sports Medicine Symposium, Hahnemann Medical School, Sept. 10-14, 1978); Wilmore, *Inferiority of Female Athletes: Myth or Reality*, 3 J. of Sports Med. 1 (1975). Copies of these articles and studies may be obtained from the Women's Equity Action League Fund, Inc. ("Project Sprint") (Washington, D.C.).

and tanks more proficiently than a larger person. *Use of Women in the Military, supra* (J.A. at 140-141). In fact, many of the jobs in the military, particularly in the Air Force and Navy, do not require the brute strength associated with military service. Finally, those women, like those men, who can not meet the physical requirements would not be called to serve. Yet the undisputed evidence that many women can perform successfully means that the MSSA now excludes a substantial portion of the qualified pool.[5]

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[5] *See e.g.*, Binkin & Bach, *supra*; N. Kinzer, *Stress and the American Woman*, ch. 2 (Ballantine ed. 1978); Adams, *Women in the Army*, 54 New Soc'y 365 (1980); Kirstein, *Female Soldiers' Social Adjustment*, 143 Mil. Med. 693 (1978); *America's Volunteers, supra* note 3 (J.A. at 80); M. Segal, Women in Combat, *supra* note 2. *See also*, Gorman, The Marines are Looking for a Few Good Women (1977) (unpublished manuscript available from the U.S. Marine Corps.); Martin, Habitability Aspects of Women Aboard Ship, 87-90 (5th Symposium on Psychology in the Air Force, U.S. Air Force Academy, April, 1976); Schreiber & Woelfel, Women in Men's Boots: Performance and Adjustment of Women in the Coed American Army of the 1970's (paper delivered at 1977 annual meeting of the American Sociological Ass'n); "Fort Jackson's WACs are Very at Home on the Range," 26 Army 26 (1976); Masson, Elements of Organizational Discrimination: The Air Force Response to Women as Military Pilots (1977) (unpublished thesis available from Univ. of Southern Cal.); Evaluation of Women Aboard the U.S.S. *Sanctuary* [AH-17] (Memorandum from the Commanding Officer, U.S.S. *Sanctuary* to Chief of Naval Personnel, dated Nov. 19, 1973) (J.A. at 166).

See also Hearings on National Legislation Before the Subcomm. on Military Personnel of the House Comm. on Armed Services, 11-15, 20-25, 28-35, 96th Cong., 2d Sess. (1980) (J.A. at 215-218, 222-225, 227-230); *Military Draft Registration: Hearings Before the Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. (1980); S. Rep. No. 96-226, 96th Cong., 2d Sess. (1980); *Presidential Recommendations, supra* note 3.

Women are clearly qualified for military service. Every woman entering the military as a volunteer today, whatever her eventual assignment, must complete the same basic training as a male en-

Others argue that all women should be excluded from registration because it is repugnant to a civilized society to expose women with family responsibilities or childbearing potential to the brutality of war. This argument ignores the fact that there already are exemptions from military service based on family responsibilities. *See, e.g.*, 50 U.S.C. App. §§ 456(h), 456(o). Applying these exemptions on the basis of individual attributes and actual characteristics, rather than on gender, is a sex-neutral method of carrying out legitimate policies relating to families without resorting to the grossly overbroad exclusion of *all* women. *Taylor* v. *Louisiana*, 419 U.S. 522, 534-35 & n.17 (1975). Additionally, some women are not capable of bearing children, nor do others wish to do so. Even for those who do plan to have children, service may simply mean deferral of these plans, as it does for men, or taking pregnancy leave.[6]

Others have argued that women's sensitive nature makes them unable to contend with the violence and brutality of war. Yet women have responded with bravery and steadfastness when they have been required or permitted to fight for their country. These characteristics are individual ones, called forth when needed, and are present in varying degrees in members of both sexes.[7]

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listee. *America's Volunteers*, *supra* note 3 (J.A. at 92); Woelfel, *Women in the Army* (paper presented at Southwest Conference on Armed Forces and Society, 1978).

[6] Even including the time taken for pregnancy leave, the Department of Defense data regarding total lost time by women and men do not reveal significant differences. *Use of Women in the Military*, *supra* at App. F-32 & 33; Hoiberg & Thomas, *supra* at 8-10.

[7] Likewise, the contention that all women should be excluded because some women hold religious convictions which preclude them from serving is absurd. Both men and women can apply for conscientious objector status based on individual beliefs. *See* 50 U.S.C. App. § 456(j).

Other fears expressed by opponents of registering women bear a striking resemblance to the apprehensions that preceded racial integration in the military—that integration would lead to lessened effectiveness, debilitation of unit morale, racial tension, and restricted unit deployability because black soldiers were alleged to be untrustworthy, unreliable, cowardly, argumentative, and less effective fighters than white soldiers. Yet the Army's own research on the effects of desegregation showed the opposite. Integrated units had less internal friction and exhibited higher morale than did segregated units; they were also more highly organized and ran more smoothly. Integration in fact led to decreased racial prejudice and revision of stereotyped thinking among the white soldiers in the integrated units. L. Bogart, *Social Research and the Desegregation of the U.S. Army* 102, 140, 219 (1969). It also removed stereotypical attitudes of blacks and whites about the relative hardship of their military roles; men in all-black units had previously felt that military hardship was motivated by discrimination while all-white units resented the fact that black units were deployed in lower-risk support capacities. *Id.* at 182.

Indeed, the judgment of the military's own experts is wholly at odds with the fears voiced about registering women and the Congressional decision to exclude them. As the district court observed:

> The army has been significantly expanding the positions open to women. U.S. Army, Evaluation of Women in the Army (1978), Record at 634; Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 75 (1978). "These changes in Army policy are not whims, but are based on extensive study." Dept. of Defense, America's Volunteers—A Report on the All-Volunteer Armed Forces at 76 (1978). In the mid 1970's, Congress opened the military service academies to women. E.g. 14 U.S.C. § 182(a). Congress repealed the statutes

> excluding women from combat in the army when it abolished the Women's Army Corps as a separate entity within the regular Army. 96 Stat. 1627, repealing, 10 U.S.C. § 3071. If we were to accept defendants' argument that the exclusion of women is necessary for an effective armed service, the inevitable sequitur of these increased numbers is that the military is intentionally and progressively weakening our armed forces.

(Jur. St. at 38a n. 28).[8]

The district court correctly concluded that the exclusion of women from registration is counterproductive to the goal of military flexibility and readiness. Under any level of scrutiny, and certainly under the heightened standard which is required, those provisions of the MSSA at issue in this case cannot survive.

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[8] As the district court also noted:

> It is difficult for us to accept the inconsistent positions of Congress. Congress has continuously allocated funds for the increase of the number of women in the armed services, in both absolute terms and as a percentage of total forces. There can be no doubt that the experience of women in the all volunteer army has been a success story . . . It is incongruous that Congress believes on the one hand that it substantially enhances our national defense to constantly expand the utilization of women in the military, and on the other hand endorses legislation excluding women from the pool of registrants available for induction. . . .
>
> The President, the Director of the Selective Service System, and representatives of the Department of Defense informed Congress that including women in the pool eligible for induction would increase military flexibility. The record reveals that in almost any conceivable military crisis the armed forces could utilize skills now almost entirely concentrated in the female population of the nation. Jur. St. at 37a-41a (footnotes omitted).

Moreover, a majority of the population concurs with the judgment of the military that women should be registered. In a Harris poll taken in March, 1980, 55% of the population surveyed favored registering women; in a Gallup poll taken in February of that year, 56% thought that registration should be required of both sexes.

B. *Appellant's Attempt to Disguise the Sex-Based Classification as a Fair and Neutral Classification Deserves Short Shrift.*

The government, recognizing that it cannot prevail on the issue of total exclusion of women from registration, has now attempted to distract the Court's attention with a novel but unfounded argument. In its brief in this Court, the government argues for the first time that the Selective Service Act does not draw a line between men and women but between those who are "combat-eligible" and those who are not. Appellant now contends that the statute is not based on gender *per se*, but on a sex-neutral "combat" classification.[9] Appellant urges that this "combat" prohibition makes the registration of women useless since their registration would restrict the flexibility of the military services by forcing them to conscript persons who could not serve in combat. This argument is a transparent attempt to hide from the issue at bar. Even if combat eligibility were an issue in this case, however, the government's argument is without legal or factual support.

First, the cases cited by the government in support of its "neutral" classification do not support its position. The disability insurance plan challenged in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) excluded only one condition from the plan, pregnancy (a condition affecting some, but not all women), but covered virtually all other medical conditions suffered by men and women. The statute did *not* distinguish between all men and all women, as the MSSA does. In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), this Court upheld a different rule on length of service for male and female naval officers because the

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[9] Applying this argument, the government would presumably argue that a statute which made only whites (or blacks) combat-eligible and then required only combat-eligible people to register would not be race discrimination.

two groups were not similarly situated and the rule, intended to offset the lesser opportunities available to women, did not reinforce stereotypical views about women's inferiority. In the instant case, many women are qualified for military service—that is, are similarly situated to the men who must register—and the exclusion from registration reinforces the stereotype that women are unfit, solely because of their sex, to serve their country.[10]

Second, the contention that "combat eligibility" is a meaningful standard as a practical matter is nothing more than sophistry. The government's argument that the MSSA is rationally related to a proper governmental function cannot be based on a policy which is itself irrational. No uniform criteria distinguish "combat" positions from other military jobs, as the government would have this Court believe.[11] The Department of Defense

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[10] Nor is this case analogous to *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979), in which a facially neutral veterans' preference statute was challenged under the fourteenth amendment because of its disparate impact on women. In *Feeney*, this Court found that the statute was not intended to distinguish between all men and all women, as women were able to become members of the class which benefitted from the law. In the case at bar, on the other hand, women can do nothing to bring themselves within the scope of the statute.

The other arguments made by the government about the appropriate standard of review are equally unpersuasive. For example, the fact that Congress may, in time, amend the statute is irrelevant. The same could be said of virtually every law this Court has reviewed. Nor is a "rational relationship" standard of review appropriate on the ground that appellees are asking this Court to interfere with the internal personnel decisions of the military services, as did plaintiffs in *Gilligan* v. *Morgan*, 413 U.S. 1 (1973). Appellees are merely asking this Court to decide whether the total exclusion of women from registration is constitutional.

[11] Confusion over the meaning of "combat" has been so acute that on several occasions Congress has requested the military to define the word. *See* 126 Cong. Rec. S6320 (daily ed. June 5, 1980) *citing* Pub. L. 95-75.

itself admits that the umbrella of "combat" covers a wide range of jobs:

> Leading a bayonet charge is different from launching an ICBM from the United States or operating a fire control system for artillery behind the lines. There is a difference between the first wave of an amphibious invasion and controlling aircraft from an aircraft carrier or typing correspondence on a fleet oiler . . . .

Use of Women in the Military, supra (J.A. at 143). Thus, combat depends neither on the nature of the skills required nor on considerations of location and risk.[12]

Moreover, women are serving and have throughout our history served successfully in many "combat" roles. As this Court has recognized:

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[12] *See Hearings Before the Subcomm. on Manpower and Personnel of the Senate Armed Services Comm., Authorization for Fiscal Year 1979*, 95th Cong., 2d Sess. 2129 (1978) (testimony of Assistant Secretary of the Army Robert Nelson).

When the needs of the military are served, the significance of the designation "combat" can be shifted. Thus, 10 U.S.C. § 8549 excludes women from serving on Air Force craft "engaged in combat missions," but 10 U.S.C. § 8067 permits female medical, dental, veterinary or nursing specialists, chaplains and judge advocates to be included on "combat" missions. Female nurses and other medical personnel are defined as "noncombatants" even when they are in battle zones. *See Hearings on Military Posture on H.R. 10929 and H.R. 7431 Before the House Comm. on Armed Services*, 95th Cong., 2d Sess. [*1978 Defense Appropriations Hearings*] 1190-1192 (1978) (J.A. at 174).

As Senator Goldwater recently observed:

> These women served as nurses, they served in ambulances. They were in combat, although technically they were not . . . . There is nothing in the orders any man ever has received in the military stating specifically, 'You are going to combat.' It just says where you are going and after you have been there a while, you figure out whether you are in combat or not.

126 Cong. Rec. S6540 (daily ed. June 10, 1980).

> Small numbers of women served in combat roles in every war before the 20th century in which the United States was involved, but usually unofficially or disguised as men. See M. Binkin and S. Bach, Women and the Military 5 (1977).

Personnel Administrator of Massachusetts v. *Feeney*, 442 U.S. 256, 268, n.18 (1979). Indeed, recent evidence suggests women had a larger role than was previously acknowledged during wars of the 18th, 19th and 20th centuries.[13] In World War II and the Vietnam War, hundreds of thousands of women served in "combat" roles in battle zones. Nor have women been spared the risk of capture. The female hostages in Iran, the women soldiers in Vietnam, and the Army and Navy nurses held prisoners of war in the Philippines during World War II were all exposed to such dangers. *1978 Defense Appropriations Hearings*, *supra* note 12, at 1203.

Finally, as noted above, the evidence is overwhelming—indeed, undisputed—that women are capable of filling current positions that bear "combat" labels. The studies performed by the Army during its annual combat simulation exercises tested units with up to 35 percent women; these units did as well as or better than all-male units in field exercises. U.S. Army Research Institute for the Beha-

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[13] During the American Revolution, tens of thousands of women in the Women of the Army Force were involved in combat as regular uniformed troops. DePauw, Women in Combat: The Revolutionary War Experience (to be published in Armed Forces and Society, 1981); Goodman, *supra* note 2, at 260-61. Many women were also "irregular" fighters affiliated with local militia. A recently discovered list, dating from the Revolutionary War, of all persons in a particular district who were capable of bearing arms, is one-fifth women. DePauw, *supra* at 19-20. The War of 1812 and the Civil War also drew many women into combat. Binkin & Bach, *supra*. Public recognition has finally been given to the members of the Women's Air Corps Service Pilots who flew military aircraft in World War II. *See* The Washington Post, p. 1, col. 3 (March 6, 1977); S. Kiel, *Those Wonderful Women in Their Flying Machines: The Unknown Heroines of World War II* 5-6 (1979).

vioral and Social Sciences, *Women Content in Unit Forces Development Test* (MAXWAC) (1977); *Women Content in the Army-Reforger 1977* (REFWAC) (1978).[14] The

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[14] *See* Savell & Johnson, Predicting Company Performance from Percent Female in Support-Type Army Units: A Second Report from the "MAXWAC" Study (paper delivered at 1980 American Psychological Ass'n annual meeting). *See also Binkin & Bach, supra,* at ch. 7; U.S. Army Human Engineering Laboratory, Technical Note 11-78 at 3-4, 11 (R 1697-98, 1705) (J.A. 96) (women loading 105 mm and 155 mm howitzers not only met the Army standards, but in several instances, exceeded it). Air Force studies indicate that nearly all women can meet the criteria for about 84% of the jobs. Hoiberg, *supra* note 2, at 8-13 & studies cited therein. The high level of performance of women cadets at the academies and the cohesion in the groups to which they belong corroborate these studies. DeFleur & Gillman, *Sex Integration of the U.S. Air Force Academy: Changing Roles for Women,* 4 Armed Forces & Soc'y 615 (1978); Durning, *Women at the Naval Academy: An Attitude Study of Armed Forces & Society,* 4 Armed Forces & Soc'y 569 (1978); Safilios-Rothschild, Women in a Male Domain: Coast Guard Men's and Women's Attitudes and Reactions (paper delivered at National Conference of the Inter-University Seminar on Armed Forces and Society). *See also* Galloway, *The Impact of the Admission of Women in the Service Academies on the Role of the Women Line Officers,* 19 Am. Behavioral Sci. 667 (1976); Safilios-Rothschild, *Men and Women Aboard a Training Cruise of the U.S. Coast Guard Barque 'Eagle,'* 10 Youth & Soc. 205 (1978). Women cadets have performed extremely well as group leaders as well. *See* Adams & Hicks, *Leader Sex, Leader Descriptions of Own Behavior, Subordinates Description of Leader Behavior (Project Athena, West Point),* 3 Int'l J. of Women's Studies 321 (1979).

Studies testing women police officers' ability to command respect, use authority, respond with force when necessary and face physical and often armed resistance are also persuasive evidence that women possess the skills required for combat. The central finding of these studies is that women police and highway patrol officers "were equally effective as males in all observed facets of police work." National Information and Research Center on Women in Policing, Performance Evaluations Information Packet 2 (June 1980); Bartlett & Rosenblum, Policewoman Effectiveness (Denver Civil Service and Denver Police Dept., 1977). Another study found no correlation between height and weight and successful perform-

Army now routinely assigns women to combat support and combat service support positions. Their performance in those positions is the best evidence of their ability to do the required tasks.[15]

Indeed, in 1979 the Defense Department asked Congress to repeal the remaining statutory restrictions on assignment of women to "combat" roles on the ground that large numbers of women "properly trained and selected, have the physical and mental ability to serve in the *entire range* of military classifications." 126 Cong. Rec. S6320 (daily ed. June 5, 1980) (emphasis added).

In sum, the government would have this Court believe in a never-never land, where combat and non-combat are neatly divided and where the rich variety of reality is sacrificed to the convenience of allowing gender to determine fate. This argument is factually and legally unsound and cannot justify the exclusion of all women as registrants for military positions.

II. The Exclusion of Women From the MSSA Reinforces Deeply-Held Stereotypes that Injure Women and Society as a Whole.

The most obvious effect on our society of the exclusion of women from the requirements of the MSSA is that a male-only draft dramatically narrows the pool of eligibles for military service and excludes many who would otherwise qualify. However, there is another, more invidious harm caused by the male-only draft: the governmentally sanctioned perpetuation of sex-role stereotypes and the endorsement of behavior consistent with them.

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ance. Kizziah & Morris, Evaluation of Women in Policing Program, Newton, Mass. (1977); *see also* Sherman, *A Psychological View of Women in Policing*, 4 J. of Police Sci. & Ad. 383 (1973).

[15] The government's argument about "combat-eligibility" is particularly ironic in light of the fact that the Army, the service into which most draftees are inducted, already assigns women to a wide range of combat positions.

The opinions of this Court over the last ten years express a growing concern about the systemic and persistent nature of "the baggage of sex-role stereotypes." *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). As this Court has recognized:

> Gender, like race, is a highly visible and immutable characteristic that has historically been the touchstone for pervasive but often subtle discrimination. . . . [G]ender-based statutory classifications deserve careful constitutional examination because they may reflect or operate to perpetuate mythical or stereotyped assumptions about the proper roles and the relative capabilities of men and women that are unrelated to any inherent differences between the sexes. Sex based classifications are in many settings invidious because they relegate a person to the place set aside for the group on the basis of an attribute that an individual cannot change. Such laws cannot be defended, as can the bulk of the classifications that fill the statute books, simply on the ground that the generalizations they reflect may be true of the majority of members of the class. A gender-based classification need not ring false to work a discrimination that in the individual case might be invidious.

Caban v. *Mohammed*, 441 U.S. 380, 398 (1979) (Stewart, J., dissenting) (citations omitted).

Stereotypes are reinforced by psychological processes that distort reality and then create expectations that influence behavior to fit the distortion. Thus, people with stereotyped views assume that the stereotyped group is homogeneous and clearly distinct from their own group. The impact of a stereotype is all the greater when it carries the sanction of the law.[16]

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[16] Bem & Bem, *Case Study of a Nonconscious Ideology: Training Woman to Know Her Place*, in D. Bem *Beliefs, Attitudes, and Human Affairs* (1970). The literature on the harmful effects of sex stereotyping is voluminous. *See, e.g.*, Merton, *The Self-fulfilling*

This Court has invalidated laws which are far less blatant than the MSSA in reinforcing negative stereotypes about women, involving institutions far less conspicuous and important to our nation than the military. For example, the statute invalidated in *Stanton* v. *Stanton*, 421 U.S. 7 (1975), requiring parental support of a son until age 21 but of a daughter only to age 18, created a self-fulfilling prophecy that a woman is destined to marry and be supported by her husband at a young age. By denying women the opportunity to obtain the education needed for many jobs, the statute made the stereotyped expectation more likely to occur.

Similarly, other laws constrain women by making it economically beneficial to distribute roles along sex lines. For example, the statute challenged in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), which denied housing benefits to most husbands of female soldiers while giving them to all wives of servicemen, became an economic incentive for married men, rather than women, to enlist.

Laws such as the MSSA that coerce or preclude women as a class from performing tasks or jobs of which they are capable impermissibly limit the right of individuals to shape their own destiny. *See, e.g., Reed* v. *Reed*, 404 U.S. 71; *Frontiero* v. *Richardson*, 411 U.S. 677. When a group has historically occupied an inferior status, permitting the government to use group identity to define individual aspirations will inevitably place a ceiling on opportunity. This Court has recognized that it makes little difference if the stereotype is ostensibly benign and the rationale for the law a protective one, as has been suggested about the MSSA. *Frontiero*, 411 U.S. at 684-85. It still limits the protected group and, on examination, proves to have debilitating effects on its members.

Prophecy, 8 Antioch Rev. 193 (1948); Morgan, *Female and Male Attitudes Toward Life: Implications for Theories of Mental Health* 6 Sex Roles 367 (1980); Broverman, Vogel, Broverman, Clarkson & Rosenkrantz, *Sex Role Stereotypes: A Current Appraisal*, 28 J. of Soc. Issues 66 (1972).

The exclusion of women from the military both repeats and magnifies broad stereotypes and generalizations about men and women. Because, in this stereotyped view, women's abilities and proper roles are different from men's and because men have traditionally dominated the military, stereotyping leads to the conclusion that women are not fit for military service. Women are believed to be physically incompetent, cowardly, and unable to withstand stress. They are seen as weak. Defense of the society and the power that accompanies that role are therefore entrusted solely to men. Feld, *Arms and the Woman*, 4 Armed Forces and Soc'y 557, 564 (1978). Women are disrespected for their "non-male" characteristics and resented for what is perceived as their "easy time." I. Frieze, J. Parsons, P. Johnson, D. Ruble, & G. Zellman, *Women and Sex Roles: A Social Psychological Perspective* 280-89 (Norton ed. 1978). Moreover, the hold of these biases is strengthened by the fact that women are not present in the conscripted class. Therefore, women are unable to demonstrate that they do not conform to stereotyped expectations.

Indeed, the view of women as weak and unfit for service contributes to tangible harm to women for two related reasons. Men perceive women as weak and vulnerable and are therefore more likely to attack them than to take on another man.[17] The staggering incidence of rape and domestic violence is eloquent testimony to this fact.[18] Second, women internalize the view of them-

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[17] *See generally* S. Brownmiller, *Against Our Will: Men, Women and Rape* (1975); L. Walker, *The Battered Woman* 35-39 (Harper Calaphon ed. 1980); Burt, *Cultural Myths and Supports for Rape*, 38 J. of Personality & Soc. Psych. 217, 229 (1980).

[18] An estimated 225,000 women were victims of violent sexual assault (rape) by men in 1975. Schram, *The Victimization of Women: Rape*, 3 Women's Policy Stud. at 77-78 nn. 1&2 (1978). A study of a nationally representative sampling of 2,134 couples showed that in 3.8% of them, the man in the past year had subjected the woman to one or more acts of violence that resulted in, or

selves as weak and incapable of self-defense, which renders them unprepared and passive in the face of attack. Recent studies show that women who take an immediate aggressive response to a rape attempt greatly enhance their chances of escape.[19] In sum, by literally prohibiting women from undertaking certain activities and fostering the belief that they do not undertake them because they *cannot*, the MSSA promotes behavior consistent with the stereotyped image.

The continued exclusion of women from eligibility for compulsory military service delivers a clear message to both women and men that women are incapable of defending themselves or their nation. Although the facts show otherwise, so long as the military, a powerful and central social institution, continues to broadcast the false message that women as a class are not fit to defend their country, men and women will continue to act and react based on that fallacy. As the court said in *Hoover* v. *Meiklejohn*, "[T]he Constitution does not permit the use of governmental power to control or limit cultural changes or to prescribe masculine and feminine roles." 430 F. Supp. 164, 169 (D. Colo. 1977).

III. The Exclusion of Women From the Pool of Registrants Consigns Them to Second-Class Citizenship.

Compulsory universal military service is central to the concept of citizenship in a democracy. M. Janowitz, *Military Conflict*, *supra* note 2, at 76; Feld, *Arms & the Women*, 4

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carried a high risk of, serious injury. Straus, *Wife Beating: Causes, Treatment, and Research Needs*, *in* U.S. Commission on Civil Rights, *Battered Women: Issues of Public Policy* (1978). *See also Battered Women: A Psychosociological Study of Domestic Violence* (M. Roy, ed. 1977); R. Gelles, *The Violent Home* (1974).

[19] *See, e.g.*, Bart, Avoiding Rape: A Study of Victims and Avoiders 13, 16-17, 22 (Study for National Institute of Mental Health, 1980); McIntyre, Victim Response to Rape: Alternative Outcomes 3 (Bureau of Social Science Research, 1980). *See also* Boulding, *Women and Social Violence*, 30 Int'l Soc. Sci. J. 801 (1978).

Armed Forces & Soc'y 557 (1978). Indeed, the responsibility to bear arms in a time of national peril is "the ultimate duty of American citizenship." *Trop* v. *Dulles*, 356 U.S. 86, 112 (1951) (Brennan, J. concurring). *See also, The Slaughter-House Cases*, 83 U.S. (16 Wall) 36 (1873); *Arver* v. *United States*, 245 U.S. 366, 378-79 (1918); *Self* v. *United States*, 150 F.2d 745 (4th Cir. 1945); *In re Martinez*, 73 F. Supp. 101, 108 (W.D. Pa. 1947). Although the MSSA proclaims that the "privileges and obligations of serving [are to] be shared generally in accordance with a system of selection which is fair and just . . ." (50 U.S.C. App. § 451(c)), it stands in fact as a profound and far-reaching exception to the fundamental principle that the quality of an individual's participation in the life of our nation should not vary based solely on his or her gender.

Being called to serve one's country on the same basis as other citizens has significant psychological and political impact. It is a statement about the value of the contribution that the community expects the individual to be able to make. Society is willing to entrust its well-being and survival to those called; any group not called is tacitly told that its members cannot be trusted to act in the common interest.[20]

The obligation to serve has often been cited as a rite of passage to adulthood because it brings large political concerns to bear on the individual in a very intense way.

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[20] *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 698 (1856) made the link between military service and the concept of citizenship explicit. Black civil rights leaders have shown a keen awareness of the value of military service in attaining full participation in the community. Goodman, *supra* note 2, at 247-48; Feld, *supra* at 564. Similarly, the recognition that young people were subject to compulsory registration and induction was an important factor in the ratification of the twenty-sixth amendment giving eighteen-year olds the right to vote.

As Senator Kassebaum observed:

> Perhaps even more important, is the fact that women should not be excluded from participating in a process which represents commitment to our Nation and its principles. Whether or not registration effectively enhances our military mobilization capability, this concept of commitment is crucial. Registration instills a sense of responsibility and awakens young people to the necessity for active involvement in the political process. This is true for both men and women.

126 Cong. Rec. S6531 (daily ed. June 10, 1980).

Depriving a group of these politically maturing experiences (which are provided to others in the society) inevitably hinders the political growth of the members of the excluded group. When the exclusion coincides with an immutable characteristic such as race or sex, historically considered a sign of inferiority, the detrimental effects are compounded, delivering a verdict of inferiority and second-class status. *See, e.g., Duren* v. *Missouri*, 439 U.S. 357, 369 (1979); *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973). Consequently, women are told that they are peripheral to the central arena of events and ideas.

Performance of military service engenders a feeling of "entitlement" to direct the life of the community to whose survival one has contributed. As Chief Justice Field of the Massachusetts Supreme Court observed, "From the earliest times most nations have conferred honors and offices upon those who have rendered distinguished service to the state, particularly in war." *Brown* v. *Russell*, 116 Mass. 14, 17, 43 N.E. 1004, 1006 (1896). As members of the class required to serve under the MSSA, all men feel "entitled" whether or not they serve personally, simply because they are "at risk" by virtue of their sex. Conversely, because all women are ineligible and are therefore not "at risk" solely by virtue of their sex,

many feel that women as a class are not "entitled" to equal rights and to a leadership role.[21] The pitifully small number of women in positions of political power bears out this fact. *See Frontiero* v. *Richardson*, 411 U.S. at 686 n.17. In the 97th Congress, for example, there are two women in the Senate and 10 women in the House. Only five percent of federal judges are women. Over the past 25 years, notwithstanding occupational and educational gains made by women, only six women have served in the Cabinet.[22] Even if women's participation continues to grow at the present rate, it could take hundreds of years for women to achieve positions of political leadership in numbers approximating their representation in the population.

While the correlation between femaleness and political officeholding is low, the correlation between military service and political officeholding is extremely high. After most of the wars in our history we have elected a military leader president, and military heroism is seen as high qualification for public office. At least 65 percent of the Congressmen serving in the 96th Congress had served in the armed forces. *See generally U.S. Government Printing Office, 1979 Official Congressional Directory, 96th Cong., 1st Sess.* (1979).

In sum, the exclusion of women as a class from eligibility for compulsory military service has devastating long term psychological and political repercussions. It excludes women from the compulsory involvement in the community's survival that is perceived as entitling people to lead it and to derive from it the full rights and privileges of citizenship. It consigns them to a second-class status wholly at odds with our basic democratic commitment

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[21] Feld, *Arms & the Woman, supra.*

[22] Statistics provided by the Eagleton Center for the American Woman and Politics, Rutgers University, New Brunswick, N.J. As of 1979, only 3% of state trial and appellate judgships were held by women and in seventeen states, no women held these positions.

to equality for all. This Court should not countenance such a result.

IV. Permitting Women to Serve as Volunteers Neither Alleviate the Harmful Effects of Excluding Them From Registration Nor Justifies that Policy.

It is contended that exclusion from the draft is unimportant because women are permitted to join the military as volunteers. In addition to being patently discriminatory on its face, this argument overlooks the glaring fact that service for women volunteers is utterly dissimilar to service pursuant to a draft. *See Use of Women in the Military, supra* (J.A. at 112, 152).

First, the numbers of women volunteers are limited by the arbitrary policies restricting their utilization. That means that women are inevitably only a small presence in the groups in which they serve. For several reasons, that fact inhibits the performance of the women. As members of a minority within the military, women are highly visible. Everything they do is seen as caused by their sex and is generalized to the other women in the group. Their loyalty to the group and the strength of their commitment to remain in it are likely to be constantly tested by their male colleagues. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 Am. J. of Soc. 965 (1977).

This phenomenon is intensified in the military because it is a traditionally male institution. The women who join are not only a small percentage of the forces; they are also doing something considered odd or unusual for a woman. Few women can be expected to endure the pressures and stigma associated with this role willingly. *See* D. Gottlieb, *Babes in Arms: Youth in the Army* 39-40 (1977); M. Segal, *supra* note 2, at 7-9. If everyone must register, however, the role of soldier would no

longer be considered aberrant for a women. A greater acceptance of women as co-professionals and co-equals could then occur.[23]

Other structural considerations prevent the volunteer option from according women equality. The same problems and excuses for failing to hire women which were made by employers subject to Title VII of the Civil Rights Act of 1964 have cropped up in the military. Housing, clothing and equipment are either not sufficiently available or are inadequately adapted to women's needs. For example, almost half of the overseas positions in the Air Force are closed to women because of an alleged lack of housing. *Use of Women in the Military, supra* (J.A. at 127). Clothing and equipment are often so ill-fitting that they interfere with safety and performance. *Hearings on Women in the Services Before the Subcomm. on Military Personnel of the House Armed Services Comm.*, 96th Cong., 1st Sess. (Nov. 15, 1979) (statement of Sally K. Richardson, Chairperson, Defense Advisory Comm.). As volunteers, women are treated poorly because there is no commitment to their long-term presence in the military.

The volunteer system for women is also inadequate because it keeps women in the low paid, low skill positions in the military. *Use of Women in the Military, supra* at 7. Experience in the private sector has shown that the mere fact of removing a formal bar to nontraditional opportunities will not suffice to change old and comfortable patterns of behavior.[24] In order to change

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[23] *See* Pennick & Doscher, Male Perceptions and Attitudinal Changes: Second Interim Report on a Study of Women at DRRI (Feb. 1977, Defense Race Relations Instit., Patrick A.F.B., R.I.); Shalit, *Strategies of Change Leading to Equity Between Men and Women with Specific Implications for the Military Organization*, 31 Human Relations 309 (1978).

[24] The slowest rate of growth of women workers over the past decade has occurred in traditionally "male" jobs. *See* Dept. of

old patterns, the armed services must see women as permanent members of the force, whose capability and potential must be developed for maximum benefit to our military forces and to women.[25]

The limitations imposed upon the number of women in the military reinforces segregation in significant numbers of civilian occupations. The military is our largest vocational and professional training institution. Many skilled jobs in the private sector of the economy are filled almost entirely by persons trained by the military. Civilian training in such skills, is, for that reason, generally not available. Eighty percent of the civilian airline pilots for example, are trained in the military. Hoiberg, *supra* note 2; Goodman, *supra* note 2, at 244 n.18. As long as the military pool receiving that training remains all-male, women will be locked out of these fields.

The limited number of women veterans also has detrimental consequences for women's position in the civilian economy. This Court is familiar with the extensive network of veterans' preference laws. *Cf. Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256.

Labor Bull. No. 2080, *supra* note 3. Despite the passage of Title VII in 1964, women still remain largely in traditionally female occupations. *Id. See also* Harrison & Dahl, Vocational Education Equity Study (U.S. Office of Educ. Contract 300-77-0318, 1979) (reporting the need for strong encouragement in order to change school age children's sex-segregated patterns of selection of vocational courses); R. Kanter, *Men and Women of the Corporation* (1977).

[25] In light of the difficulty of being in an all-male institution, there will be pressures on the women soldiers to fill traditionally "female" jobs. Indeed, the first group of women volunteers did that. Only when numbers grew did the "male" specialties start to be open to women. Once in these jobs, women discover that they can perform them and feel a sense of accomplishment at having met a new challenge. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women, supra;* Gottlieb, *supra* at 53-54 (1977); Durning, Women's Experience in Male-Dominated Career Fields and Work Groups (paper presented at the Annual Convention of the Western Psychological Ass'n, 1977).

The significant employment preferences which veterans receive often give them a lifelong advantage in the workforce.[26] The equitable way to remedy the disparate impact that these programs have on women is to register and induct young people into military service based on ability, not sex.

The situation faced by women volunteers is thus in no way equivalent to service pursuant to registration and induction. Nor is it constitutionally acceptable as a substitute. *See Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 64 L.Ed.2d 107, 116. The volunteer alternative cannot cure the blatant discrimination of the MSSA.

CONCLUSION

The slow process of dismantling stereotypes and starting to see people as individuals can only occur if the cycle of old expectations and behaviors is broken. The exclusion of women from registration must end because it does not serve the goal of an effective military and because it powerfully reinforces stereotyped beliefs about women and their role in our society. The cycle cannot be broken as long as the government continues through its military exclusion policy to lend unwarranted and harmful credence to the stereotypes that fuel it.

For the reasons set forth above, the judgment of the district court should be affirmed.

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[26] Veterans, as well as members of the services, also receive substantial educational, insurance, medical, housing and retirement benefits. *See* Goodman, *supra* note 2, at 245 n.19 and statutes cited therein.

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